

G5kddwys

Sentence

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

15 Cr. 0385 (AJN)

5 JOSEPH P. DWYER,

6 Defendant.

7 -----x

8 May 20, 2016
9 12:05 p.m.

10 Before:

11 HON. ALISON J. NATHAN,

12 District Judge

13 APPEARANCES

14 PREET BHARARA

15 United States Attorney for the
16 Southern District of New York

17 BY: HADASSA WAXMAN

BROOKE CUCINELLA

Assistant United States Attorneys

18 GUY OKSENHENDLER

19 Attorney for Defendant

G5kddwys

Sentence

1 THE CLERK: U.S. v. Joseph P. Dwyer.

2 Parties, please state your name for the record,
3 starting with the government.

4 MS. WAXMAN: Good afternoon, your Honor. Hadassa
5 Waxman and Brooke Cucinella for the government.

6 THE COURT: Good afternoon to you both.

7 MS. CUCINELLA: Good afternoon.

8 MR. OKSENHENDLER: Good afternoon, your Honor. Guy
9 Oksenhendler for Mr. Dwyer.

10 THE COURT: Good afternoon, Mr. Oksenhendler.

11 And good afternoon, Mr. Dwyer.

12 THE DEFENDANT: Good afternoon.

13 THE COURT: We're here today for sentencing in United
14 States v. Joseph Dwyer, 15 CR. 385. In preparation for today's
15 proceeding, I have reviewed the probation report, which is
16 dated April 11, 2016. I've also received and reviewed the
17 following additional submissions. I have the defendant's
18 submission, dated May 13, 2016, and what has come in in
19 connection with the submission over a number of days over the
20 last week I believe adds up to a total of 41 letters from
21 family members, friends, and former colleagues. And I have
22 reviewed those, although I did want to note, Mr. Oksenhendler,
23 there is one that I couldn't read. There is handwriting and a
24 copy was bad and I just --

25 MR. OKSENHENDLER: That's unfortunately, Judge, how I

G5kddwys

Sentence

1 received it. Some of these things may have been scanned by
2 other people and then sent to me, and I gave it to you. I even
3 tried to darken it once I received it and you got the very best
4 copy that I have, but the copy that I had was somewhat
5 illegible as well.

6 THE COURT: I'll note that I think it came from Bob
7 Hall and maybe someone else.

8 MR. OKSENHENDLER: Yes.

9 THE COURT: So I received it but I did not review it.
10 And then I have the submission from the government,
11 which is dated March 18, 2016.

12 Is there anything else I should have in front of me
13 for purposes of sentencing?

14 MS. WAXMAN: No, your Honor.

15 MR. OKSENHENDLER: No, your Honor.

16 THE COURT: OK. And now with respect to the -- I
17 think, Mr. Oksenhendler, all of the letters are now filed on
18 ECF, is that right?

19 MR. OKSENHENDLER: Yes, your Honor.

20 THE COURT: And I think there was one in our
21 cross-checking that I believe didn't make it on there from
22 Anne --

23 MR. OKSENHENDLER: Anne Hall. You know what, I looked
24 for it. I called the investigator to see if he had it. I
25 could not find it. If I find it again in my file, I promise

G5kddwys

Sentence

1 you I will file it on ECF.

2 THE COURT: Well, I have it. You submitted it to me.

3 MR. OKSENHENDLER: I understand, but I couldn't find
4 the copy that I had.

5 THE COURT: OK.

6 MR. OKSENHENDLER: I believe I had sent a hardcopy --

7 THE COURT: Oh, I see. You sent me your only copy.
8 Well, I will docket it and file it.

9 MR. OKSENHENDLER: Thank you, your Honor.

10 THE COURT: Then remaining redaction issue pertained
11 to the sentencing submission. Do you want to take that --
12 address that?

13 MR. OKSENHENDLER: Yes, your Honor. I would like to
14 suggest to the Court that perhaps we take that up at the end of
15 the proceeding, as I believe some of the redacted information
16 may come up during the proceeding and, therefore --

17 THE COURT: It will answer the question.

18 MR. OKSENHENDLER: Yes, it would moot the issue as to
19 certain things.

20 THE COURT: OK. All right. We'll take it up at the
21 end. Thank you.

22 Is there anything else, counsel, I should have in
23 front of me for purposes of sentencing?

24 MR. OKSENHENDLER: No, your Honor. That is all the
25 defense has to submit.

G5kddwys

Sentence

1 MS. WAXMAN: And that is all from the government, your
2 Honor. Thank you.

3 THE COURT: Thank you. Let me just confirm now that
4 you have fully received each other's submissions as I have just
5 described them?

6 MS. WAXMAN: We have, your Honor.

7 MR. OKSENHENDLER: Yes, your Honor.

8 THE COURT: All right. Turning to the presentence
9 report, Mr. Oksenhendler, I know that you have, but for the
10 record have you read the presentence report and discussed it
11 with your client?

12 MR. OKSENHENDLER: I have, your Honor.

13 THE COURT: And I know there had been some objections
14 but it seems as though those have been worked through. So, I
15 want to confirm -- well, I'll get to the objections in a
16 moment. Let me just ask, Mr. Dwyer, that you did have an
17 opportunity to review the presentence report and discuss it
18 with your counsel?

19 THE DEFENDANT: Yes, your Honor.

20 THE COURT: And to raise any -- an opportunity to
21 raise any errors with him, if there were any?

22 THE DEFENDANT: Yes, your Honor.

23 THE COURT: All right. Thank you.

24 And, Ms. Waxman, for the record, have you reviewed the
25 presentence report?

G5kddwys

Sentence

1 MS. WAXMAN: I have, your Honor.

2 THE COURT: So let me ask, then, putting aside the
3 calculation of the Sentencing Guidelines for a moment, are
4 there any objections to the report regarding factual accuracy?

5 MS. WAXMAN: Not from the government, your Honor.

6 MR. OKSENHENDLER: None other than was addressed by
7 probation.

8 THE COURT: All right. Thank you.

9 Given that, I will adopt the factual recitations set
10 forth in the PSR. The PSR will be made a part of the record in
11 this matter placed under seal. If an appeal is taken, counsel
12 on appeal may have access to the sealed report without further
13 application to this Court.

14 Turning to the guideline calculation. As counsel is
15 aware, I am no longer required to follow the Sentencing
16 Guidelines but I am still required to consider the applicable
17 guidelines in imposing sentence and must, therefore, accurately
18 calculate the sentencing guideline range. In this case there
19 was a plea agreement to which the parties stipulated to a
20 particular calculation of the Sentencing Guidelines. And,
21 counsel, am I correct that the calculation in the PSR is in
22 accord with that agreement?

23 MS. WAXMAN: Yes, your Honor. That is correct.

24 MR. OKSENHENDLER: Yes, your Honor.

25 THE COURT: And there are no objections?

G5kddwys

Sentence

1 MR. OKSENHENDLER: No, your Honor.

2 MS. WAXMAN: No, your Honor, not from the government.

3 THE COURT: Based on the parties' agreement, the
4 absence of objection and my independent evaluation of the
5 Sentencing Guidelines, I accept the guideline calculation in
6 the PSR. Accordingly, using the November 1, 2015 Edition of
7 the Sentencing Guidelines, I do find that the offense level is
8 12, Criminal History Category is I, and that produces a
9 guideline range of 10 to 16 months' incarceration.

10 Turning to departures. I believe your sentencing
11 submission -- your plea agreements also indicated that though
12 the parties would be free to argue for a variance, both sides
13 agreed not to seek a departure within the guidelines' system;
14 is that correct?

15 MS. WAXMAN: Yes, your Honor. That is correct.

16 MR. OKSENHENDLER: Yes, your Honor.

17 THE COURT: Nevertheless, I have considered whether
18 there is an appropriate basis for departure from the advisory
19 range within the guidelines' system and don't find grounds
20 warranting a departure. As I have said, I am prepared to hear
21 arguments from counsel consistent with the submissions as to
22 whether a variance is appropriate.

23 Ms. Waxman, does the government wish to be heard with
24 respect to sentencing?

25 MS. WAXMAN: Yes, your Honor, just very briefly.

G5kddwys

Sentence

1 As set forth in our letter to the Court that we
2 submitted earlier this week, Mr. Dwyer's conduct had an impact
3 well beyond the defendants he was retained to assist.

4 Obtaining the names and locations of witnesses before the
5 government took the necessary precautions to protect their
6 safety and the safety of their families put real people at
7 risk. His conduct also compromised the integrity of criminal
8 investigations and eroded the trust that the public has in us
9 and in our law enforcement partners.

10 The rules governing disclosure in criminal cases are
11 designed to protect the safety of witnesses, victims, and
12 cooperators. They are designed to ensure the integrity of the
13 investigative process and to give folks confidence that, within
14 the appropriate legal constraints, their identities and
15 locations will be protected. If people do not adhere to those
16 rules, the whole system falls apart. Victims and witnesses put
17 their trust in us and take serious risks in coming forward. If
18 we, meaning the government and our law enforcement partners,
19 cannot be trusted to keep these folks safe, victims and
20 witnesses would not come forward and serious crimes cannot be
21 prosecuted.

22 Your Honor, the government then would respectfully
23 rest on its submission and we would be happy to answer any of
24 your Honor's questions. Thank you.

25 THE COURT: Thank you, counsel.

G5kddwys

Sentence

1 One question. I'm not sure if I have ever received a
2 government submission that didn't specifically argue for a
3 sentence within the guideline range, and I want to make sure
4 that I am appropriately noting the significance of that, and
5 you don't say not but you don't say yes. So, Ms. Waxman?

6 MS. WAXMAN: Your Honor, I would just state that, as
7 in all cases, the government believes that the guideline range
8 serves an appropriate purpose of the sentencing.

9 THE COURT: Right. That doesn't resolve the question.
10 But I understand it and I understand the office's policy. I am
11 sometimes frustrated by it, but a message is sent, I think,
12 with the language chosen. And I understood the submission here
13 to be not particularly taking issue with probation's
14 recommendation, for example, that a nonincarceratory sentence
15 would be reasonable.

16 MS. WAXMAN: Your Honor, I think it would be fair to
17 say that the government believes that a guidelines' sentence
18 would be appropriate in this case.

19 THE COURT: Well, then, just to put a final dot on the
20 "i," does the government believe that a nonguidelines'
21 sentencing would be insufficient?

22 MS. WAXMAN: Your Honor, we think that a
23 nonguidelines' sentence would not serve the purposes of
24 sentencing and a guidelines' sentence would be appropriate.

25 THE COURT: I understand. I have said it in other

G5kddwys

Sentence

1 proceedings that I understand at some level the need for the
2 policy, but, again, I wish we were just a little more explicit
3 about what the government's position would be. I'm left to
4 interpret it and do my best at that as a factor to consider in
5 deriving ultimately at the decision as to what the appropriate
6 sentence would be, but I'll leave it at that.

7 Mr. Oksenhendler.

8 MR. OKSENHENDLER: Thank you, your Honor.

9 Your Honor, on January 10, 1994, a young attorney who
10 was optimistic and idealistic walked into the First Department
11 uptown and got sworn in as an attorney. In June of '94, I
12 walked into this courthouse and became a member of the bar of
13 this court. And around that time they were just completing our
14 new courthouse across the street, which isn't so new anymore,
15 and what always struck me about walking into the United States
16 District Court for the Southern District was that beautiful
17 sculpture of Justice when you walk into the front lobby. And
18 there embodied in the beautiful sculpture were beliefs that I
19 held as a student and as a young lawyer and there it was
20 tangible to see in a very important place.

21 The best part about that sculpture are the scales in
22 Justice's hands which balance everything out, and that's what
23 we are all searching for. As Ms. Waxman walks in that
24 building, I'm sure she looks at it, and I'd like to believe
25 that the day you were sworn in and walked into that courthouse,

G5kddwys

Sentence

1 perhaps you looked at that statue, too.

2 But what makes the criminal justice system fair isn't
3 just the ethics of the parties. It is not just the jurists.
4 It's not just the prosecutors, and I find Ms. Waxman to be one
5 of the best. It's not the ethics of defense counsel. There
6 are other components and other variables in the equation which
7 allows all the parties that are seeking to achieve justice, to
8 do that, to reach that goal.

9 For the prosecution, they work with law enforcement.
10 They have agents, police officers, lots of resources on their
11 side. And I've often joked with agents about the fact that the
12 prosecutors are working on their cases and with prosecutors
13 about the fact that agents work on their cases. But on the
14 defense side, we work with people like Joe Dwyer. He was one
15 of the guys that was one of the great equalizers, and his role
16 in what we all seek in achieving justice was so critically
17 important to the defense. I never personally had the honor of
18 working with Joe on one of my cases, but I have spoken to many
19 colleagues who I have known for decades who hold him in the
20 highest regard for his professional work. They are all
21 saddened, and many expressed their disappointment to me, that
22 Joe is sitting before you today. But without any hesitation
23 I'm going to ask the Court to impose a lenient sentence in this
24 case and impose a sentence of probation.

25 One of Joe's former colleagues, an attorney who I've

G5kddwys

Sentence

1 known for many years, really hit the nail on the head in
2 describing Joe Dwyer to me when I first began my representation
3 of him. And that was Joe -- and I think this is such a great
4 quote: "Joe is just like Alex Rodriguez. He didn't need to
5 cheat to make the Hall of Fame." And when that attorney said
6 that to me, I called Joe on the phone and I'm like, Hey, I get
7 who you are.

8 Joe and I have a lot in common. We talked about the
9 fact that, God, how many 14- to 18-hour days did you work, and
10 we began our discussion seeing how we could outdo one another
11 about how hard we would work. We talked about the fact that
12 oftentimes we felt like we had to work until we saved the
13 world. And I think therein lies Joe's greatest flaw. As hard
14 as he worked and as professional as he was, as many innocent
15 people as he exonerated, as many defendants that he assisted in
16 getting a fair plea offer through his hard work, Joe made an
17 awful decision and shortcutted a very ingenious way he figured
18 out how to get documents -- and I will explain that to the
19 Court in a moment, but he crossed the line, he committed a
20 crime. And I know for a fact, besides the fact that he has
21 pleaded and allocuted in front of this Court, but I know how
22 sorry he truly is.

23 He loved, from the very bottom of his heart, his
24 career as an investigator. I know many people in our
25 profession, all of ours, believe deeply that the work we do

G5kddwys

Sentence

1 here is important for our society. I know that you believe
2 your work is important. I know I believe my work is important,
3 and I know Ms. Waxman's job is awfully important. But Joe
4 really took his cases to heart.

5 What initially started as a shortcut -- if I could
6 just give you a little background? Oftentimes defense
7 attorneys are at a disadvantage. Those are what the rules are.
8 Congress writes the rules. They certainly favor the
9 prosecutors in this courthouse. And that has to do with the
10 timing of the disclosure of certain documents, which often
11 leave defense counsel in the dark as to who was involved with
12 their client in the commission of a crime or allegedly involved
13 in the commission of a crime.

14 And the first time that I tried a case in this
15 courthouse in 1995 before Judge Sprizzo, which was a three-ton
16 cocaine importation case, it became very apparent to me at how
17 difficult it was at the very last minute to get 3500 material
18 and catch up on all this information that the prosecution often
19 had for months or years. So the defense is always at a loss,
20 always trying to find information. And Joe, who is a very
21 bright guy, who initially began working with his brother, who
22 also, from what I understand, although I've never worked with
23 him, has an outstanding reputation as an investigator. The two
24 then began to realize that, well, perhaps we could do Freedom
25 of Information Act requests to get information about criminal

G5kddwys

Sentence

1 investigations, that perhaps we could subpoena documents, get
2 so-ordered subpoenas to get certain documents. And the result
3 of their ingenuity in figuring that out was the FOIA requests
4 and the subpoenas would often turn up what are called 61
5 reports generated by the NYPD and other information which they
6 would be able to get ahead of time, before the Jencks time.

7 Now, in this court judges routinely inform the
8 government that although they can't direct them to do it, I'd
9 like this turned over two weeks before trial, although the
10 statute says the government isn't required to turn over much of
11 the information that makes a defense possible until after a
12 witness testifies at a proceeding. And I think these rules are
13 unfair. But Joe worked hard to help defense counsel, and in
14 helping defense counsel, he allowed defense counsel to make or
15 to give intelligent information to their clients to help them
16 make the knowing, intelligent and voluntary decisions they have
17 to make with regard to pleading guilty or not pleading guilty
18 and whether they would testify in a particular case, how their
19 cross-examination would be conducted, thereby safeguarding the
20 constitutional rights that everybody in this courtroom is
21 concerned about.

22 I wrote in my letter I truly believe that my client
23 was a hard-working guy. He was a zealous investigator. He
24 became overzealous, perhaps a little lazy by finding a shortcut
25 and asking someone who he knew to get him documents that he

G5kddwys

Sentence

1 should not have gotten. I blame him for that. He was wrong to
2 do that.

3 But in balancing out his wrong actions here, I'm going
4 to ask the Court to consider the entirety of who Joe Dwyer is.
5 The government said in its sentencing submission that my client
6 committed these acts for financial gain and that's why he did
7 this, to increase his practice, to have more clients. And as
8 much as I respect Ms. Waxman and her opinion, I believe that
9 the argument is specious. My client did not commit this crime
10 for financial gain. There is a very simple way for us to
11 determine if he did so.

12 If my client was hired by attorneys who were aware
13 that he was able to get these documents off the law enforcement
14 database and they knowingly told him, Joe, I'm hiring you
15 because I know you have a guy who can get these documents,
16 Mr. Buell would not be the only codefendant in this case. If
17 there were attorneys that knowingly conspired with Mr. Dwyer to
18 commit the offense for which he has allocuted to in this case,
19 there would be defendants in this case who were members of the
20 bar of the State of New York and were members of the bar of the
21 Southern District.

22 In this case I have not seen one allegation against
23 one of my colleagues, who I all hold in very high regard, nor
24 do I know of any discipline taken against any colleague for the
25 use of those documents. So the fact that the government has

G5kddwys

Sentence

1 argued to you that attorneys hired him because they knew he
2 could get these documents, I don't believe that argument holds
3 any weight. If attorneys knew that he could get these --

4 THE COURT: You are saying that that is inherent in
5 the argument that he did this for financial gain, or are you
6 saying that explicit contention?

7 MR. OKSENHENDLER: I believe that goes to the
8 financial gain. He didn't -- he didn't -- he worked hard but
9 he wasn't hired more often because he could get these
10 documents. There were lots and lots of cases that he's worked
11 on, probably over a thousand, that had nothing to do with these
12 documents. The number of cases that are involved in this case,
13 by my estimation, is around 20 cases. He's handled over a
14 thousand if not closer to two in his -- 2,000 in his 20-year
15 career as an investigator.

16 Now, the government claimed in their letter that
17 between 2011 and 2014 Mr. Dwyer had an income of \$500,000 from
18 CJA, and I would like you to look at that number, that figure,
19 in this way. Investigators on average are paid a little less
20 than \$100 an hour for their services to the court and to the
21 defense bar. It is usually 90 or 95. But if I use a hundred
22 as a round number, for the four years between 2011 and 2014,
23 that would be about 5,000 hours worth of work billed to CJA.
24 If you divide the 5,000 hours by the four years, you're talking
25 about 1250 hours a year that he worked on CJA cases, which

G5kddwys

Sentence

1 would be about \$125,000 a year, which, while by anybody's
2 standard is a terrific income, it is not unreasonable for a
3 hard-working professional such as an investigator to make that
4 type of money in that time span. He did not make an inordinate
5 amount of money for the professional that he was in the time
6 that the government described to the Court.

7 They said that his ability to get these documents had
8 him so busy that he was able to -- he had to hire other people,
9 and that argument also has to fail. When Mr. Dwyer went out on
10 his own and began his own investigation company, he had someone
11 working I would say it would be similar to an "of counsel"
12 relationship with this other individual, and that guy started
13 working with him in 2006. Over the years, there were two or
14 three other part-time people that worked for very, very short
15 periods of time. So between 2006 and the end of 2014, there
16 were only three people who worked -- one person worked, from
17 what I understand, two months, and then two other individuals
18 worked five or six months for him in that 10-year span. There
19 was one other person that primarily worked with Joe in his
20 practice over that 10-year period.

21 And this business, this extraordinary business that he
22 was able to get because of what the government claims was his
23 wrongdoing, did not necessitate him having to hire lots of
24 other people in his business. He had someone like an associate
25 that worked with him the whole time, and then over the course

G5kddwys

Sentence

1 of the 10 years there were three other people who for a very
2 short period of time worked with him.

3 I'd like to point out page 19 of the final presentence
4 report. There was an objection that we made as to paragraphs
5 14 and 15, that they be omitted from the report that your Honor
6 just made part of the record. At no point did my client bill
7 the Criminal Justice Act and pay Mr. Buell with money that he
8 billed the Criminal Justice Act. The very last sentence of
9 page 19 says, "After conferring with the government, the
10 above-noted information has been omitted from 14 and 15," and
11 that was with regard to payments from CJA funds. There should
12 be no consideration that my client used CJA funds to pay
13 Mr. Buell. It was out of his own pocket.

14 In this case, just to show the character of my client,
15 my client had a proffer with the government. From what I
16 understand, there was tremendous concern, rightly so, by the
17 prosecutors in this case as to the breadth of wrongdoing by
18 anyone who was a member of law enforcement. In that proffer,
19 my client described what had gone on, including his own
20 criminal liability, and from what I understand, although I
21 wasn't his attorney at the time, he was completely truthful in
22 that proffer. In that proffer he described the attorneys that
23 he worked with, and this leads me to my thought on disparity in
24 this case.

25 For whatever reasons, although they are beyond my pay

G5kddwys

Sentence

1 rate, the U.S. Attorney's Office has found that there was no
2 wrongdoing by any defense counsel. It's not for me to comment
3 on who they prosecute and why they prosecute. All I know is
4 that as we stand here today -- as I stand here today in this
5 courthouse, there are no colleagues of mine that are charged
6 with wrongdoing. I do know, unfortunately, that my colleagues,
7 some of them, used documents that Joe was able to get, yet they
8 were not charged with any offense. And so in considering
9 disparity of sentences, I would ask that you consider that no
10 one else was charged with any offense here, besides Mr. Buell,
11 that had worked with Joe on these cases, and I suggested to the
12 Court there were about 20.

13 I'd like to bring to the Court's attention my
14 sentencing submission with regard to medical issues as a
15 consideration. I won't touch on anything more about that.

16 In the gallery here today is his wife, his sister, his
17 niece, his brother. There are other family members that would
18 like to come but weren't able to make it. I would just suggest
19 that he's very, very fortunate that he has the love of his
20 family.

21 Again, to talk about his character and the respect for
22 justice that he has, I'd like to bring up the case -- it is a
23 New York State Supreme Court case currently pending in the
24 Bronx County -- People v. Garry, G-a-r-r-y. And this case,
25 your Honor, not only shows his deep concern about doing

G5kddwys

Sentence

1 justice, but it also shows the tremendous respect that Joseph
2 Dwyer, the son of a police sergeant, has for law enforcement.

3 The Gary case involves the murder of a retired police
4 detective, Oswald Potter. An individual, the defendant, last
5 name Gary, was convicted of the offense. He had three
6 accomplices in the offense. All of them ultimately, from what
7 I understand, were arrested here in the Southern District for
8 criminal offenses. They all pleaded guilty for the Oswald
9 Potter murder. And one of them, Mr. Broussard, became a
10 Southern District informant.

11 Some years later, defendant Gary filed a
12 post-conviction motion in the Bronx Supreme Court, saying that
13 he was wrongly convicted, that he was an innocent man, and that
14 he should not continue having to serve a sentence for a crime
15 that he didn't commit.

16 Mr. Dwyer became involved in the motion for Mr. Gary
17 to exonerate him of this crime that Mr. Gary claimed he was
18 wrongly convicted of. Joe's greatest asset as an investigator
19 was his ability to speak to anybody, get people to talk to him.
20 And ultimately he got to speak to Mr. Broussard, the S.D.N.Y.
21 informant, and pursuant to law, Mr. Dwyer was able to record
22 the conversation that he had with him.

23 Now, Mr. Broussard, in 2008 and in 2014 had identified
24 in a photo array two other individuals that were responsible
25 for Oswald Potter's death, or Detective Potter's death,

G5kddwys

Sentence

1 clearing his friend Mr. Gary, kind of throwing him a bone.

2 Mr. Dwyer went to speak to Mr. Broussard. And in the
3 conversation, to Mr. Dwyer's surprise, Mr. Broussard admitted
4 that in fact Mr. Gary was the shooter and did murder Detective
5 Oswald Potter. Broussard had already been testifying in a
6 Bronx Supreme Court proceeding that he wasn't -- that Gary
7 wasn't the shooter. At some point later -- and I should note
8 that Mr. Dwyer had interviewed Mr. Broussard two years before
9 he testified at the hearing. At some point the tape that
10 Mr. Dwyer made was given to defense counsel on that case, who
11 was handling the exoneration motion, the post-conviction
12 motion, but -- and I still don't understand why -- that tape
13 wasn't turned over to the Bronx District Attorney's office.
14 After Mr. Dwyer was arrested, the tape made its way to the
15 Bronx District Attorney's office, because Mr. Dwyer, although
16 concerned about justice being done where an innocent man should
17 not remain in jail, wanted to make sure that a cop killer
18 wasn't wrongly released.

19 And so the Bronx District Attorney's office, with an
20 opportunity to listen to that tape, spoke to Mr. Dwyer. He
21 testified at a hearing, knowing that Mr. Broussard was an
22 informant of the Southern District and that there could be some
23 kind of consequence to doing what he did. He felt that justice
24 required that he do the right thing.

25 So any argument that my client wasn't interested in

G5kddwys

Sentence

1 justice, he made sure, to the extent that he could, that
2 someone that killed one of the princes of this city is held
3 responsible for taking that prince's life.

4 The government -- I am getting close, Judge. The
5 government said that criminal investigations, prosecutions
6 could have been jeopardized, but in this case none of the
7 information jeopardized a prosecution or investigation. They
8 said witnesses could have been intimidated. They could have
9 been but they weren't. There could have been witness
10 tampering, but there wasn't. And evidence could have been
11 destroyed, but it wasn't. There were no claims that Mr. Dwyer
12 used any of the wrongful information that he acquired for a
13 nefarious purpose. No one was threatened. No one was
14 intimidated. No evidence was destroyed. No one was hurt.
15 There was no retaliation.

16 The information that he gave to the lawyers was used
17 for the lawyers to help their clients make important decisions
18 in this courthouse.

19 He did a lot of good things in his life. He has four
20 beautiful kids and a beautiful wife. He threw away a 20-year
21 career working with the very, very best of the criminal defense
22 bar in this city. He worked with people on the Capital Defense
23 Panel. He worked with the Innocence Project and the
24 Exoneration Initiative. There are a lot of good things to be
25 proud of Joe Dwyer. It is an honor to represent him. He made

G5kddwys

Sentence

1 a terrible mistake. I'm very glad I can stand here and say no
2 one was hurt because of his stupidity. But because of his hard
3 work and his initiative, I'm very proud to stand here and say
4 there are a lot of people who were wrongly convicted and
5 exonerated through his efforts.

6 So in balancing all the equities in this case, your
7 Honor, I would ask that you impose a sentence of probation.

8 THE COURT: Thank you, Mr. Oksenhendler.

9 MS. WAXMAN: Your Honor.

10 THE COURT: Yes.

11 MS. WAXMAN: Just a couple of things.

12 First, at some point the government is going to ask
13 for just a very brief adjournment of a couple of moments,
14 because I think that some of the comments made on the
15 Mr. Broussard matter were not accurate. We would like to
16 consult with a couple of people in our office so that we can
17 respond to the Court in a meaningful way.

18 But just very briefly, your Honor, first I would like
19 to address some of the points that Mr. Oksenhendler made.

20 MR. OKSENHENDLER: Can we just hold on one second?

21 (Handing a document to Ms. Waxman)

22 MS. WAXMAN: Your Honor, if I may briefly just address
23 a few of the points that counsel made?

24 THE COURT: Go ahead.

25 MS. WAXMAN: The first is that Dwyer was a very

G5kddwys

Sentence

1 sought-after investigator because he was the best, and the
2 reason he was the best is because he could get his hands on
3 things that other investigators could not get their hands on
4 and he did that by breaking the rules. The rules are the
5 rules, and they are designed to strike a very delicate balance
6 between the defendant's rights and the legitimate rights of
7 criminal victims and witnesses to preserve their very lives.
8 Witnesses, especially in crimes of violence, where Mr. Dwyer
9 was retained are very afraid to come forward and only do so
10 because they believe that we can protect them, and here
11 Mr. Dwyer put that whole process in grave danger and, as a
12 result, victims and witnesses, whose rights deserve to be
13 vindicated in a criminal prosecution, are afraid to come
14 forward and the system will continue to fall apart.

15 THE COURT: Ms. Waxman, just to press. So, the
16 government makes an argument as to motivation, that --

17 MS. WAXMAN: Yes.

18 THE COURT: -- Mr. Dwyer was motivated by financial
19 gain. Mr. Oksenhendler, it's a little bit complicated but the
20 point I think being made is the premise of that is that defense
21 lawyers had to know he could get this material, therefore he
22 was hired and therefore got more jobs because they knew they
23 could get this material. If that were true, premise number
24 two, then there would be defense counsel codefendants here.

25 Is that the government's financial gain argument, and

G5kddwys

Sentence

1 are those premises necessary to the conclusion that at some
2 level he was motivated by financial gain?

3 MS. WAXMAN: Your Honor, I don't think that the
4 involvement or the knowledge of defense lawyers is at all
5 necessary to our argument. The argument is that, as he
6 considers himself, Joe was known as the best, he could get
7 stuff, and defense lawyers hired him because he was the best at
8 his job.

9 Now, let me just say one thing on this argument,
10 Mr. Dwyer's argument that he was somehow singled out or that
11 the lawyers who retained Mr. Dwyer were not charged. First, as
12 an initial matter, your Honor -- and we feel very strongly
13 about this -- this sentencing proceeding is about Mr. Dwyer, it
14 is not about anything else, it is about Mr. Dwyer. And
15 Mr. Dwyer's conduct here, which is extremely serious and put
16 the system at risk, has to be evaluated.

17 Second of all, it would obviously not be appropriate
18 for us to comment on the nature of our investigation or what we
19 did about the lawyers, but what I can assure the Court and I
20 can assure the public, that the government investigated this
21 case very, very seriously and very, very vigorously, and we
22 brought the charges that the evidence supported and we feel
23 very comfortable with that and very confident on that.

24 Your Honor, as to Mr. Oksenhendler's statement that he
25 said Dwyer did not use CJA funds to pay Mr. Buell, let me say

G5kddwys

Sentence

1 this: That CJA billings were the vast majority of Mr. Dwyer's
2 income for the period charged in the indictment and in the
3 information. Whether or not the funds were paid directly from
4 CJA or Mr. Buell or whether they were paid indirectly is not
5 really relevant. The fact is that Mr. Dwyer made his money
6 from CJA billings, and then, in turn, Mr. Dwyer paid Mr. Buell
7 thousands of dollars in exchange for obtaining information --
8 private, privileged, confidential information that he was not
9 otherwise entitled to.

10 THE COURT: I mean, the point is he didn't submit a
11 bill with a line item \$500 expenses that was then reimbursed.
12 Your point is that most -- yes, it came out of his pocket.
13 Most of what went into his pocket was CJA money.

14 MS. WAXMAN: Exactly. His pocket was lined with CJA
15 money and that part of that money went out to pay Mr. Buell in
16 connection with this conduct. That is my point there.

17 THE COURT: Right.

18 MS. WAXMAN: Your Honor, if I can just ask for a brief
19 adjournment on that one issue so that we can consult, I would
20 appreciate it. I will be no more than five minutes.

21 THE COURT: All right.

22 THE CLERK: All rise.

23 (Recess)

24 THE COURT: Ms. Waxman.

25 MS. WAXMAN: Yes. Thank you, your Honor, and thank

G5kddwys

Sentence

1 you for the brief adjournment.

2 So on the Broussard issue, your Honor, we would just
3 like to note that the representations that were made on the
4 Broussard tape we don't believe are entirely accurate, but it
5 is not something the government would like to get into here nor
6 can we get into it here because it's a matter of an ongoing
7 state proceeding in the Bronx, and we wouldn't want to
8 jeopardize that proceeding.

9 THE COURT: I don't need to decide who committed that
10 murder to sentence Mr. Dwyer.

11 MS. WAXMAN: Thank you, your Honor.

12 THE COURT: Let me just -- the point Mr. Oksenhendler
13 is making, I think if we step back a little bit, is that
14 consistent with the portrait he's painting of Mr. Dwyer as
15 someone who cares about justice and was willing to take some
16 level of risk in coming forward in that case and that I should
17 consider that in my sentencing conclusion. Do you disagree
18 with that?

19 MS. WAXMAN: Your Honor, I would like to note, though,
20 the timing of Mr. Dwyer's disclosure. That disclosure was made
21 in the Broussard case after he was charged here by the federal
22 government and after he was arrested. So I think that your
23 Honor should also, when considering his actions on Broussard,
24 should also take into account the timing of that disclosure.

25 THE COURT: So, in other words, I should look at the

G5kddwys

Sentence

1 nobility of it with some skepticism out of concern that it was
2 done in part to make the argument being made here, is that
3 the --

4 MS. WAXMAN: Frankly, yes, your Honor, that would be
5 our position, yes.

6 Your Honor, just to say that, again, I said this but I
7 just want to reiterate, that all of that argument on Broussard,
8 it does not have anything to do with what Mr. Dwyer did here,
9 which is looking up witnesses, looking up the names of victims,
10 disclosing them to the defense team in a way that put people at
11 risk, real human beings at risk, that made our job harder, that
12 made the prosecution of violent criminals harder, and he did so
13 by bribing a member of the NYPD.

14 Now, your Honor, I would like to go back to a --

15 (Mr. Oksenhendler rose)

16 THE COURT: You will have a chance, Mr. Oksenhendler.

17 MR. OKSENHENDLER: Yes.

18 MS. WAXMAN: I would like to go back to a question
19 that your Honor asked earlier in the proceeding. In light of
20 your Honor's comments, I would just like to make it very, very
21 clear that it is our view Mr. Dwyer is not above the law. As I
22 noted, he put real people at risk, and he deserves a serious
23 punishment. He does not deserve a slap on the wrist. And I
24 would say, your Honor that probation's recommendation would not
25 be appropriate in this case given the conduct, given the

G5kddwys

Sentence

1 seriousness of it, and given the fact that he undermined the
2 judicial system as we know it.

3 THE COURT: All right. Mr. Oksenhendler.

4 MR. OKSENHENDLER: Just very briefly, Judge.

5 The timing of the matters in Broussard, as far as I
6 understand them, had nothing to do with me coming in here and
7 making this argument. I think, despite his error on the 20
8 cases that brought him before you, what he did in Broussard is
9 evidence of what he did on the other 1,980 cases that he
10 handled. He worked at a very high level, very long hours, and
11 in a very affable way got people to make true statements to
12 him, which helped courts, juries, prosecutors and defendants
13 make intelligent decisions.

14 The government had the same opportunity, if not more,
15 than I had to give input to probation to formulate the
16 presentence report in this case, and I believe that the
17 recommendation of the United States Probation Office in this
18 case is well worth it.

19 THE COURT: All right. Anything else, counsel?

20 Mr. Dwyer, you are not obligated to make a statement
21 to me but if you would like to do so, sir, you may do that now.

22 I just ask you, sir, to pull up the microphone and
23 keep your voice up and take your time.

24 THE DEFENDANT: Your Honor, I take full responsibility
25 for my conduct. I have -- I prepared something. I am just

G5kddwys

Sentence

1 going to kind of read it.

2 THE COURT: That is fine.

3 THE DEFENDANT: I take full responsibility for my
4 conduct that brings me here before you today. I am very sorry
5 for my actions.

6 When I became a police officer at the age of 20, my
7 goal was to become a first grade homicide detective. My father
8 was a Suffolk County Police Sergeant for 30 years, and there
9 was a long line of law enforcement in the Dwyer family. Things
10 didn't go my way, and after breaking two bones in my neck while
11 making an arrest, my career was over in a flash at the age of
12 25. It was, to say the least, very disheartening.

13 The funny thing is, or I should say the ironic thing
14 is a few years later, without even realizing it, I became a
15 homicide detective. It wasn't quite the way I had planned
16 things out, but, nonetheless, over a span of 20 years, I was
17 investigating murders, lots and lots of murders, but as you
18 know, it was not my job to solve the murder. I never had the
19 luxury to do crime scenes, to interview live witnesses, to
20 obtain vital records. Most often, I became involved sometimes
21 five, 10, 20 years after the crime had been committed. I was,
22 after all, a criminal defense investigator, and I proudly
23 worked for attorneys who in many instances represented indigent
24 minority defendants charged with death-eligible offenses. No
25 matter if it were a petit larceny or a grisly double homicide,

G5kddwys

Sentence

1 I did the very, very best I could on every single case that I
2 had the privilege to work on.

3 Your Honor, in short, I became too engaged and
4 overwhelmed in trying provide a zealous defense for my clients.
5 Some said, including especially my wife, I became obsessed.
6 There was never any ulterior motive. I worked tirelessly and I
7 tried to be the best investigator I could. In doing so, I used
8 poor judgment and I made a terrible mistake.

9 It's been quite an ordeal for my wife and children
10 over the last few years. As for my three teenage daughters and
11 my son -- he turns 13 on Monday -- I can only say they are my
12 life. They are the air that I breathe. The very big mistake I
13 made which brings me here has caused enormous devastation and
14 pain. I am doing everything in my power to find a way to help
15 my family survive and move forward. I am very sorry to them,
16 to the Court for all that has occurred.

17 I would just like to tell you that I was devastated
18 when the government's sentencing memorandum was filed
19 Wednesday, as was my family and everyone that knows me. It was
20 the first time in 17 months, with two attorneys, that I had
21 ever heard a motive about money. And I stand before you today,
22 your Honor, accepting responsibility. I made a stupid mistake.
23 This had nothing to do with not one dollar. In fact, I used my
24 own money, stupidly, to try to get reports to help the cases
25 along, to try to find the truth.

G5kddwys

Sentence

1 And the fact of the matter is those are just words on
2 a paper. I know this isn't an evidentiary hearing, but when
3 the government writes things such as "\$500,000," I work a
4 tremendous amount of hours 24/7. I did actually close to 4,000
5 cases, and I had a full-time retired NYPD detective who was my
6 employee with me from 2006. And from 2006, when I went on my
7 own in this business, after starting in 1995, from 2006 through
8 2010, before Mr. Buell ever came into the picture, I had
9 decade-long relationships with the top level of attorneys in
10 the Eastern and Southern District, that I had worked for them
11 for over 10 years, some 15, some close to 20, and the idea that
12 because I could illegally and stupidly -- with stupidity
13 obtain a police report somehow encouraged them to hire me is
14 false and that's -- I would hope in deciding a sentence you
15 will take all of this into consideration. And one other thing.
16 And when that memorandum was filed, it's the first time I ever
17 heard of that motive. That's inconsistent with the PSR. I was
18 devastated.

19 I would hope that in deciding a sentence, you will
20 truly understand how sorry I am for making that terrible
21 decision and violating the law, but I would hope that you would
22 take my life into consideration as a whole and never make me
23 miss one day of my beautiful children's life.

24 Thank you.

25 THE COURT: Thank you, Mr. Dwyer.

G5kddwys

Sentence

1 Just for confirmation of the record, Mr. Oksenhendler,
2 there is not a request for any kind of factual hearing on this
3 issue, is there?

4 MR. OKSENHENDLER: No, your Honor, not at all.

5 THE COURT: OK. All right.

6 Anything else?

7 MR. OKSENHENDLER: Thank you for listening.

8 THE COURT: All right. You may be seated.

9 THE DEFENDANT: Thank you, your Honor.

10 THE COURT: Ms. Waxman.

11 MS. WAXMAN: The government has nothing else.

12 THE COURT: All right. Thank you.

13 Counsel, I assume, then, that there is no reason why
14 sentence should not be imposed at this time?

15 MS. WAXMAN: No, your Honor.

16 MR. OKSENHENDLER: No, you your Honor.

17 THE COURT: As I have stated, the guideline range
18 applicable to this case is 10 to 16 months' imprisonment.
19 Under the Supreme Court's decision in Booker and its progeny,
20 the guideline range is only one factor the Court must consider
21 in deciding the appropriate sentence. I'm also required to
22 consider the other factors set forth in 18 U.S.C., Section
23 3553(a), and these include the nature and circumstances of the
24 offense, the history and characteristics of the defendant, the
25 need for the sentence imposed to reflect the seriousness of the

G5kddwys

Sentence

1 offense, to promote respect for the law, to provide just
2 punishment for the offense, to afford adequate deterrence to
3 criminal conduct, to protect the public from further crimes of
4 the defendant, and to provide the defendant with needed
5 education or vocational training, medical care or other
6 treatment. I am to take into account the kinds of sentences
7 available, as I said, the guideline range and any pertinent
8 policy statement, and the need to avoid unwarranted sentence
9 disparities and the need to provide restitution to any victims
10 of the offense. I am required to impose a sentence sufficient
11 but no greater than necessary to comply with the purposes I've
12 just described.

13 I have given substantial thought and attention to the
14 appropriate sentence in this case in light of the 3553(a)
15 factors and the appropriate purposes of sentencing as reflected
16 in the statute.

17 I'm not going to hide the ball here. I'm not sending
18 you to prison.

19 (Spectators reacted)

20 THE COURT: Order. There will be no further
21 disruptions -- no further disruptions -- or I will have to ask
22 you to leave.

23 I'm not sending you to prison for this crime,
24 Mr. Dwyer, and I'm not doing so for the following reasons.
25 First, this is your first offenses and I do have confidence

G5kddwys

Sentence

1 that you will not again engage in this kind of illegal conduct.
2 Second, you pled guilty and you have accepted responsibility
3 for your criminal wrongdoing. Third, you have and you will
4 continue to suffer the very real and very serious consequences
5 of your action. You've jeopardized your livelihood, damaged
6 your reputation, embarrassed yourself and your family, and you
7 will have to continue to live under the restrictions and
8 supervision of the Probation Department and the consequences of
9 being a convicted felon. Fourth, as many of the letters I
10 received convinced me, you are a hard-working, dedicated, and
11 honorable family man with a history of public service both
12 through your time on the police force and your work as an
13 investigator in criminal matters before this and other courts.
14 For these reasons, I agree with the recommendation of the
15 Probation Department that a sentence of probation is sufficient
16 to meet the relevant goals of punishment, including deterrence
17 and just punishment.

18 That I'm not requiring you to serve time in prison,
19 Mr. Dwyer, does not mean that I think what you did is not
20 serious and deeply damaging to our system. It was. You
21 crossed the line, and you did so for reasons that I believe
22 involved both at some general level a desire for financial gain
23 and for zealous investigation and advocacy on behalf of your
24 indigent clients. But either way, you crossed the line. You
25 broke the law. You decided you knew better than, for example,

G5kddwys

Sentence

1 Congress, which put the discovery rules in place. You decided
2 you knew better than law enforcement, which protects private
3 information of citizens that it keeps in its databases by
4 restricting access to law enforcement officers. You decided
5 you knew better than the U.S. Attorney's Office, which
6 carefully considers safety precautions that must be in place in
7 advance of witness disclosure. And you decided you knew better
8 than courts, judges like me, who enforce the rules and
9 procedures upon which our criminal justice system and the rule
10 of law are built. Whatever may have motivated you to do what
11 you did, you decided the rules should not apply to you or your
12 clients, and you crossed the line and you broke the law, and in
13 doing so you could have and maybe did put individuals in
14 danger, but you certainly participated in the corruption and
15 corroding of our system.

16 I sincerely hope and expect that the fact of your
17 prosecution and the consequences you are suffering and will
18 suffer as a result will serve to deter others from making
19 similar wrong, dangerous, and criminal choices.

20 But as I said, Mr. Dwyer, I am not incarcerating you.
21 I do believe that we are all more than the worst mistakes that
22 we make. I believe your history and characteristics, as
23 described by your family members, friends and colleagues,
24 including many members of the bar that practice before me,
25 demonstrates that an incarceratory sentence is unnecessary to

G5kddwys

Sentence

1 meet the goals of punishment that I have described.

2 I'll now formally state the sentence I intend to
3 impose. Mr. Dwyer, will you please rise.

4 It is the judgment of this Court that you are
5 sentenced to a five-year term of probation.

6 You may be seated.

7 During your term of probation, the following
8 restrictions apply: You will be subject to the standard
9 conditions of supervision and, in addition, the following
10 mandatory conditions. You shall not commit another federal,
11 state, or local crime. You shall not illegally possess a
12 controlled substance. You shall not possess a firearm or
13 destructive device.

14 I will suspend the mandatory drug testing condition
15 based on my determination that you pose a low risk of future
16 substance abuse.

17 You shall cooperates in the collection of DNA as
18 directed by the probation officer.

19 In addition, you will be subject to the following
20 special conditions: You shall provide the probation officer
21 with access to any requested financial information.

22 You are to report to the nearest Probation Office
23 within 72 hours.

24 I do recommend that you be supervised in your district
25 of residence.

G5kddwys

Sentence

1 I'm waiving the fine because I don't believe you have
2 the ability to pay the fine.

3 I am imposing a mandatory special assessment of \$100,
4 which shall be due immediately.

5 Is there anything to address regarding forfeiture or
6 restitution?

7 MS. WAXMAN: No, your Honor.

8 THE COURT: Does either counsel know of any legal
9 reason why the sentence shall not be imposed as stated?

10 MS. WAXMAN: I do not, your Honor.

11 MR. OKSENHENDLER: No, your Honor.

12 THE COURT: Sentence as stated is imposed. I do find
13 that the sentence is sufficient but not greater than necessary
14 to satisfy the sentencing purposes I described earlier.

15 Mr. Dwyer, I know you know this but you must of course
16 comply strictly with all of the terms of supervision that you
17 will be under by the Probation Department and you must comply
18 strictly with those conditions. If you are brought back before
19 me for any violation of those conditions, I may sentence you to
20 a term of imprisonment, and I hope and expect that you won't
21 put me to that decision.

22 Ms. Waxman, are there any remaining counts or
23 underlying indictments that need to be dismissed at this time?

24 MS. WAXMAN: There are none, your Honor.

25 THE COURT: Mr. Dwyer, I see no basis for an appeal,

G5kddwys

Sentence

1 but I am required to inform you of your appellate rights. To
2 the extent that you have not given up your right to appeal your
3 conviction and sentence through your plea of guilty and the
4 agreement that you entered into with the government in
5 connection with that plea, you have the right to appeal. If
6 you are unable to pay the cost of an appeal, you may apply for
7 leave to appeal in forma pauperis, that is to say, without
8 payment. Notice of Appeal must be filed within 14 days of the
9 judgment of conviction.

10 Counsel, is there anything else I can address at this
11 time?

12 MR. OKSENHENDLER: Yes, Judge. We have the
13 outstanding redaction.

14 THE COURT: Yes.

15 MR. OKSENHENDLER: I believe the redaction that I made
16 with regard to his proffer is no longer necessary.

17 THE COURT: Great.

18 MR. OKSENHENDLER: So I would be happy to post my
19 sentencing submission including that paragraph.

20 With regard to the other redactions, I believe they
21 are appropriate under the S.D.N.Y. guidelines for redactions
22 which regard to family, medical, personal information and would
23 ask that those redactions simply stand.

24 THE COURT: I think there is overredaction in that
25 regard. I think some of the very specific medical issues could

G5kddwys

Sentence

1 appropriately be redacted, so I will ask you to resubmit with
2 the unredactions as we've discussed, and you can propose some
3 specific redactions to the specific medical records.

4 Otherwise, I think it goes beyond what's authorized.

5 MR. OKSENHENDLER: Yes, Judge. No problem.

6 THE COURT: Anything else, Mr. Oksenhendler?

7 MR. OKSENHENDLER: No, your Honor.

8 THE COURT: Ms. Waxman?

9 MS. WAXMAN: No, your Honor.

10 THE COURT: I thank both counsel for their advocacy
11 here.

12 We are adjourned.

13 THE CLERK: All rise.

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